Dr Teh Bee Tee v Dr Joshua Mohanraj Daniel & Anor

HIGH COURT (SHAH ALAM) — WRIT NO 23NCVC-28–12 OF 2017
AKHTAR TAHIR J
14 FEBRUARY 2018

Damages — Assessment — Tort — Special damages — Claim for travelling, accommodation and food expenses — Loss suffered due to breakdown of marriage — Cost of treatment — Loss of income — General damages — Cost of future medical and surgical treatment and surveillance — Pain and suffering and loss of amenities — Loss of earning capacity and future loss of earnings

Tort — Negligence — Medical negligence — Breach of duty of care — Whether first defendant negligent in coming to a wrong diagnosis leading to the loss suffered by the plaintiff — Whether second defendant vicariously liable

The plaintiff was claiming for damages against the first and second defendant for causing immeasurable physical and mental pain as well as other losses. The plaintiff was a consultant cardiologist with the second defendant whereas the first defendant was a pathologist practicing at second defendant. The plaintiff consulted Dr Tang Boon Nee ('Dr Tang') a consultant obstetrician and gynecologist at second defendant after having a problem of prolonged menses. Upon consultation the plaintiff underwent a laparoscopic myomectomy undertaken by Dr Tang on 11 May 2013. The tissues removed during the procedure were sent to the second defendant's laboratory for histopathological examination. The first defendant examined the tissues and reported them to be benign. In 2015, the plaintiff discovered that she had a 9cm mass suspected to be ovarian mass. Dr Tang undertook a laparoscopic procedure and removed a vascular tumor from the uterus together with other tissues which were sent to the second defendant's laboratory for histopathological examination and Dr R Pathmanathan who was also a consultant pathologist with the second defendant confirmed the tumor to be endometrial stromal sacorma. The plaintiff was referred to Dr Tan Teck Sin for further treatment as the cancer had spread from the uterus to many parts of the abdomen and had to be removed. The issues for consideration were: (a) whether the first defendant negligent in coming to a wrong diagnosis in 2013 leading to the loss suffered by the plaintiff in 2015; and (b) whether the second defendant vicariously liable for the loss suffered by the plaintiff as a result of the negligence of the first defendant.

Held:

(1) The first defendant had a duty of care towards the plaintiff when he carried out the tests on the samples sent. He should have asked for further clarification from the referral doctor and should have carried out diagnosis if he was fully satisfied of an accurate result. The mistake in identifying the correct shape of the cells had a profound effect on the final results. He had also could give no explanation for his failure in carrying out the additional immunostains. The breach of duty of the first defendant was a result of his own personal failings and had no connections with his professional qualification. These personal failings of the first defendant could be described in one word apathy. The nonchalant attitude of the first defendant in carrying out the diagnosis resulted in a serious breach of the duty of care he owed towards the plaintiff (see paras 10 & 13–16).

(2) There was no antecedent relationship between the plaintiff and the second defendant as the second defendant had no role to play in the actions of Dr Tang who decided to send the samples to the first defendant. Also, the first defendant's apathy could not be blamed on the hospital unless there were prior complaints against the first defendant for such an attitude and no action had been taken. There was no evidence that any complaints had been lodged against the first defendant to the hospital. Hence the second defendant could not be considered liable for the negligence of the first defendant. The hospital also could not be vicariously liable for the negligence of the first defendant as the first defendant was neither an employee of the second defendant nor had any contract of service with the second defendant (see paras 22–24).

(3) The depression and mental agony suffered by the plaintiff on discovering the cancer two years later was foreseeable and damages could be given. However, for the plaintiff to go on foreign holiday to calm her nerves was certainly not foreseeable by any stretch of the imagination. Therefore these items of special damages were disallowed. The court also disallowed the loss suffered as a result of a breakdown in the plaintiff's marriage to her husband as it was a result of her own unreasonable behavior. Further it was the plaintiff who left the marital home on her accord. The court allowed the cost of treatment of RM96,000 although the plaintiff by virtue of working with the second defendant and the cost of her treatment was borne by the second defendant. There were no documents produced by the plaintiff to prove the loss of income from August 2015 to December 2016. The document tendered to show loss of income showed loss of income for three months ie at an average of RM40,000 a month. The court therefore awarded this sum as loss of income (see paras 29–32).

(4) The cost of future treatment would be only necessary in the event of the recurrence of the disease which was in five years time. While accepting

the plaintiff's calculation the court took into account the likelihood of recurrence. The court therefore opted to further reduce the multiplier by five years and allowing a multiplier of eight years of the amount (see paras 34–35).

(5) The court awarded a sum of RM200,000 for pain and suffering and loss of amenities. This sum would also cover any future pain and suffering as a result of further treatment and surgery (see para 36).

(6) The plaintiff failed to show any future loss of earning or loss of earning capacity. There was no evidence led to show that the surgery had affected the plaintiff's capability as a cardiologist. The court therefore decided not to award any damages for either loss of earning or loss of earning capacity (see para 37).

[Bahasa Malaysia summary

Plaintif menuntut ganti rugi terhadap defendan pertama dan kedua kerana menyebabkan kesakitan fizikal dan mental yang tidak terhingga serta kerugian lain. Plaintif adalah penasihat pakar kardiologi dengan defendan kedua manakala defendan pertama adalah pakar patologi yang beramal di defendan kedua. Plaintif meminta nasihat Dr Tang Boon Nee ('Dr Tang') penasihat pakar obstetrik dan sakit puan di defendan kedua selepas mengalami masalah haid yang berpanjangan. Selepas konsultasi plaintif menjalani laparoskopik myomectomy yang dilakukan oleh Dr Tang pada 11 Mei 2013. Tisu-tisu yang diambil semasa prosedur telah dihantar ke makmal defendan kedua untuk pemeriksaan histopatologi. Defendan pertama memeriksa tisu-tisu tersebut dan melaporkan ianya tidak merbahaya. Pada tahun 2015, plaintif mendapati bahawa terdapat massa bersaiz 9cm yang disyaki sebagai massa ovari. Dr Tang melakukan prosedur laparoskopik dan mengeluarkan tumor vaskular dari rahim bersama-sama tisu-tisu lain yang dihantar ke makmal defendan kedua untuk pemeriksaan histopatologi dan Dr R Pathmanathan yang juga pakar patologi dengan defendan kedua mengesahkan tumor tersebut adalah endometrial stromal sacorma. Plaintif telah dirujuk kepada Dr Tan Teck Sin untuk rawatan lanjut kerana kanser telah merebak dari rahim ke beberapa bahagian abdomen dan perlu dibuang. Isu-isu pertimbangan adalah: (a) sama ada defendan pertama cuai dalam membuat diagnosis salah pada 2013 yang menyebabkan kerugian yang dialami oleh plaintif pada 2015; dan (b) sama ada defendan kedua bertanggungjawab secara vikarius untuk kerugian yang ditanggung oleh plaintif akibat kecuaian defendan pertama.

Diputuskan:

(1) Defendan pertama mempunyai kewajipan berhati-hati terhadap plaintif apabila beliau menjalankan ujian terhadap sampel-sampel yang dihantar. Beliau sepatutnya meminta penjelasan lanjut daripada doktor rujukan dan sepatutnya melakukan diagnosis jika beliau berpuas hati dengan

keputusan yang tepat. Kesilapan dalam mengenal pasti bentuk sel-sel yang betul mempunyai kesan yang mendalam pada keputusan akhir. Beliau juga tidak dapat memberi penjelasan mengenai kegagalannya dalam menjalankan immunostain tambahan. Perlanggaran kewajipan oleh defendan pertama adalah hasil dari kegagalan peribadi sendiri dan tidak berkaitan dengan kelayakan profesional beliau. Kegagalan peribadi defendan pertama dapat dijelaskan dengan perkataan acuh tidak acuh. Sikap tidak bersalah defendan pertama dalam menjalankan diagnosis tersebut menyebabkan perlanggaran kewajipan yang serius yang beliau terhutang terhadap plaintif (lihat perenggan 10 & 13–16).

(2) Tiada hubungan sebelumnya di antara plaintif dan defendan kedua kerana defendan kedua tidak mempunyai peranan untuk dimainkan dalam tindakan Dr Tang yang memutuskan untuk menghantar sampel-sampel kepada defendan pertama. Selain itu, sikap acuh tidak acuh defendan pertama tidak boleh disalahkan atas hospital melainkan terdapat aduan sebelum terhadap defendan pertama untuk sikap sedemikian dan tiada tindakan yang diambil. Tiada keterangan bahawa sebarang aduan telah dibuat terhadap defendan pertama kepada hospital. Oleh itu defendan kedua tidak boleh dianggap bertanggungjawab atas kecuaian defendan pertama. Hospital itu juga tidak boleh bertanggungjawab secara vikarius atas kecuaian defendan pertama kerana defendan pertama adalah bukan pekerja defendan kedua atau mempunyai kontrak perkhidmatan dengan defendan kedua (lihat perenggan 22–24).

(3) Kemurungan dan penderitaan mental yang dialami plaintif setelah mengetahui kanser dua tahun kemudian adalah dijangka dan ganti rugi boleh diberikan. Walau bagaimanapun, bagi plaintif untuk pergi bercuti ke luar negara untuk menenangkan fikirannya adalah tidak dapat dijangka oleh sebarang imaginasi. Oleh itu perkara-perkara untuk ganti rugi khas tidak dibenarkan. Mahkamah juga menolak kerugian yang ditanggung akibat daripada keruntuhan perkahwinan plaintif dengan suaminya kerana ia adalah akibat daripada tingkah laku yang tidak munasabah oleh beliau sendiri. Tambahan lagi plaintif yang meninggalkan rumah perkahwinan atas kehendaknya sendiri. Mahkamah membenarkan kos rawatan sebanyak RM96,000 walaupun plaintif bekerja dengan defendan kedua dan kos rawatan beliau ditanggung oleh defendan kedua. Tiada dokumen yang dikeluarkan oleh plaintif untuk membuktikan kehilangan pendapatan dari Ogos 2015 hingga Disember 2016. Dokumen yang ditender untuk menunjukkan kehilangan pendapatan menunjukkan kehilangan pendapatan selama tiga bulan iaitu pada purata RM40,000 sebulan. Mahkamah oleh itu mengaward jumlah ini sebagai kehilangan pendapatan (lihat perenggan 29–32).

(4) Kos rawatan masa depan hanya akan diperlukan sekiranya penyakit tersebut berulang dalam masa lima tahun. Sementara menerima pengiraan plaintif mahkamah mengambil kira kemungkinan pengulangan. Mahkamah oleh itu memilih untuk terus mengurangkan penggandaan sebanyak lima tahun dan membenarkan penggandaan sebanyak lapan tahun dari jumlah (lihat perenggan 34–35).

(5) Mahkamah mengaward jumlah sebanyak RM200,000 untuk kesakitan dan penderitaan dan kehilangan kemudahan. Jumlah ini juga akan merangkumi sebarang kesakitan dan penderitaan masa depan akibat rawatan dan pembedahan selanjutnya (lihat perenggan 36).

(6) Plaintif gagal untuk menunjukkan sebarang kehilangan pendapatan masa depan atau kehilangan keupayaan pendapatan. Tiada keterangan yang menunjukkan pembedahan tersebut telah menjejaskan keupayaan plaintif sebagai pakar kardiologi. Mahkamah dengan itu memutuskan untuk tidak mengaward sebarang ganti rugi sama ada untuk kehilangan pendapatan atau kehilangan keupayaan pendapatan (lihat perenggan 37).]

Notes

For cases on medical negligence, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1657–1676.

For cases on tort, see 6(1) *Mallal's Digest* (5th Ed, 2016) paras 338–343.

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 6 AMR 609, FC (folld)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (folld)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] 2 CLJ Rep 300, FC (refd)

Pritchard v J H Cobden Ltd and another [1987] 1 All ER 300, CA (refd)

Woodland v Essex County Council [2014] 1 All ER 482, SC (refd)

Manmohan S Dhillon (PS Ranjan & Co) for the appellant.

Maidzuara Mohammed (Raja Darryl & Loh) for the first defendant.

Tharumarajah s/o C Thiagarajah (Azim, Tunku Farik & Wong) for the second defendant.

Akhtar Tahir J:

THE BRIEF FACTS

[1] The plaintiff is a consultant cardiologist with the second defendant at Ramsay Sime Darby Hospital previously known as Subang Jaya Medical Centre which is a private hospital whereas the first defendant was a pathologist practicing at the second defendant.

[2] The plaintiff consulted one Dr Tang Boon Nee a consultant obstetrician and gynecologist at the second defendant after having a problem of prolonged menses. Upon consultation the plaintiff underwent a laparoscopic myomectomy undertaken by the said Dr Tang Boon Nee on 11 May 2013.

[3] The three fibroids and endometrial tissues removed during the laparoscopic procedure were sent to the the second defendant's laboratory for histopathological examination. The the first defendant examined the tissues at the the second defendant's laboratory in 2013 and reported them to be benign.

[4] In 2015 the plaintiff suffered an injury while cycling and suffered broken ribs. The plaintiff underwent an ultrasound to rule out any internal bleeding and it was then discovered that she had a mass of 9cm suspected to be ovarian mass.

[5] Upon discovering this mass on 20 June 2015, Dr Tang undertook a laparocopic procedure and removed a vascular tumor from the uterus together with other tissues which were sent to the the second defendant's laboratory for histopathlogical examination.

[6] The vascular tumor and other tissues were sent to Dr R Pathmanathan who was also a consultant pathologist with the the second defendant. Dr Pathmanathan confirmed the tumor to be endometrial stromal sacorma.

[7] On learning of this finding which was communicated Dr Tang the plaintiff was referred to Dr Tan Teck Sin for further treatment. Dr Tan advised further surgery whereby a total abdominal hysterectomy with bilateral salpingo-oophorectomy was done on the plaintiff. In lay man's term the cancer had spread from to the uterus to many parts of the abdomen and had to be removed.

[8] It is the plaintiff's claim that the the first defendant had in 2013 wrongly diagnosed the cancer to be benign when it was malignant and this led the cancer to spread from the uterus to all parts of the abdomen in 2015 causing the plaintiff immeasurable physical and mental pain as well as putting the

plaintiff at a greater risk of recurrence. For this pain and suffering and other losses the plaintiff is now claiming for damages against the first and the second defendants.

THE ISSUE

[9] The issue for determination in this case is whether the the first defendant negligent in coming to a wrong diagnosis in 2013 leading to the loss suffered by the plaintiff in 2015? The other issue is whether the the second defendant vicariously liable for the loss suffered by the plaintiff as a result of the negligence of the the first defendant?

THE COURT'S FINDING

Liability the first defendant

[10] In all cases of negligence the court has to determine whether the defendant has a duty of care towards the plaintiff and whether the defendant has breached that duty leading to a loss to the plaintiff. The the first defendant without doubt had a duty of care towards the plaintiff when he carried out the tests on the samples sent. The nature of duty of care in a professional negligence is well expounded in the case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 as follows:

> ... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapton omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ... he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of ... men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

[11] The next question whether the defendant has breached his duty of care towards the plaintiff is best reflected in the situation described in the book *Buckley The Law of Negligence and Nuisance* (5th Ed) at p 162 under the caption 'No special skill required':

> 6.08 In Royal Brompton Hospital NHS Trust v Hammond (No 6) Judge Richard Seymor QC said:
>
> > In a case such as the present, if I am satisfied on the evidence that an obvious mistake was made which would not have been made by any careful person of whatever profession or, indeed, of none, then I can find that person who made that mistake was negligent.

Thus in the earlier case of *JD Williams & Co v Michael Hyde & Associates* the Court of Appeal agreed with the trial judge who held that an architect's decision not to make further investigations into a matter of concern and instead accept at face value assurances received after making of initial inquiries, was not a matter for the application of special professional skill. The Bolam test was therefore inapplicable, and the finding that the architect was negligent was upheld.

[12] In this case there were obvious mistakes made by the the first defendant in diagnosing the samples sent by Dr Tang removed from the plaintiff, which required no special skill to determine and these mistakes were admitted by the the first defendant himself. The two mistakes made and admitted by the the first defendant were before the carrying out the diagnosis itself. The the first defendant had agreed during cross examination the in carrying out a diagnosis on any sample sent it was important to ascertain the history of the patient. In this case in the referral letter there was no mention at all of the history of the plaintiff leading her to be treated by the doctor who had sent the samples retrieved during treatment, for testing by the the first defendant.

[13] Further the first defendant testified that the samples sent were in small pieces when the ideal sample would be a whole sample which would could give more accurate results. Despite of being dissatisfied with these two shortcomings in the samples sent, the the first defendant went ahead with the testing without so much as a phone call to the doctor who had sent the samples. To a question by the court whether he could have asked for clarification or refuse to carry out the tests without getting proper samples the the first defendant testified that he was in no position to reject the samples. This was in contradiction to the testimony of the the second defendant's chief executive officer Dr Vasuhi Murugiah who testified that the the first defendant should have asked for further clarification and could have refused to carry out the tests if he was dissatisfied with the samples. The court decided that under the circumstances of the shortcomings, the the first defendant should have asked for further clarification from the referral doctor and should have carried out diagnosis if he was fully satisfied of an accurate result. This was a duty owed to the plaintiff by the the first defendant and he has clearly breached this duty

[14] Further another obvious mistake made by the the first defendant which did not require any special skill to determine is the shape of the cells tested under the microscope. The the first defendant described the cells as round or polygonal when in actual fact it is spindle shape and no special skill is required to determine the shape. The shape of the cells can be determined by a lay man by just looking at it. The mistake in identifying the correct shape of the cells has a profound effect on the final results as testified by Dr Pathmanathan. This obvious mistake by the the first defendant once again proves the breach of duty towards the plaintiff.

[15] Finally although the the first defendant initially denied carrying out a test called immunostains he retracted his denial when he was confronted by the testimony Dr Pathmanathan who testified that it was only the the first defendant could have done the immunostains. The court accepted the explanation of the the first defendant that it was an oversight on his part when he earlier testified that he did not carry out this particular test and that in fact he had carried out the four immnostains. However the more important aspect of the the first defendant's testimony was his admission that he should have carried out two more additional immunostains as done by Dr Pathmanathan and this would have given a completely different finding and the findings would be in line with the finding of Dr Pathmanathan. the first defendant could give no explanation for his failure in carrying out the additional immunostains. This again was a breach of duty on the part of the the first defendant.

[16] The breach of duty of the the first defendant in this case is a result of his own personal failings and has no connections with his professional qualification. This personal failings of the the first defendant in this case can be described in one word *apathy*. The nonchalant attitude of the the first defendant in carrying out the diagnosis resulted in a serious breach of the duty of care he owed towards the plaintiff.

Liability of the second defendant

[17] The the second defendant is a private hospital where the the first defendant worked at. The evidence led however showed that the the first defendant was employed and paid by Dr Pathmanathan. He did not have a contract of service with the the second defendant although the the second defendant provided all the facilities used by the the first defendant. The evidence also showed that the second defendant carried out a screening of the the first defendant and had cleared the the first defendant to work at the premise of the the second defendant.

[18] The responsibilities and liabilities of a private hospital in a medical negligence case were extensively considered by the apex court in the case of *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 6 AMR 609. The apex court decided that the doctrine of non-delegable duty applied in Malaysia. The court decided as follows:

> The nature of a non-delegable duty, is in essence, a positive duty to ensure that reasonable care is taken. Viewed in its proper context thus, non-delegable duties are not an anomaly in the law of negligence without a common basis, but founded on established concepts rooted in the general principles of the law of negligence itself.

[19] The five features highlighted in the *Woodland v Essex County Council*

A [2014] 1 All ER 482 in the application of doctrine of non-delegable duties is stated as follows:

> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself,
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> (i) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant.
>
> (ii) which places the claimant in the actual custody, charge or care of the defendant, and
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> It is characteristic of such relationship that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substancial in the case of schoolchildren.
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> (3) The claimant has no control over how the defendant choose to perform those obligations, ie whether personally or through employees or through third parties.
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> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
>
> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[20] The apex court in *Dr Kok*'s case qualified the application of the features highlighted in *Woodland*'s case to the facts and circumstances of each case. The apex court stated as follows:

> ... Given that the role of the hospital may vary from patient to patient, the extent and scope of the hospital's duty must be ascertained from the facts and circumstances of the case.

[21] In *Dr Kok*'s case the apex court decided in respect of the second feature that was mentioned in *Woodland*'s case there must be an antecedent relationship between the defendant and the plaintiff. The apex court decided as follows:

> ... The personal choice of a patient is not an independent test itself but a relevant factor in applying the Woodland analysis, in particular in determining whether

there is an antecedent patient-hospital relationship from which to impute an assumption of responsibility by the hospital towards the patient.

The facts in this case point against the existence of suce an antecedent relationship. From the circumstances surrounding the plaintiff's engagement of Dr Kok and admission to the hospital, it can be inferred that the plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by Dr Kok, we do not find that the hospital has assumed a positive duty to protect the plaintiff from injury.

[22] In this case the antecedent relationship is between the plaintiff and Dr Tang. It was Dr Tang's decision to send the samples for analysis to the pathology department. The the second defendant had no role to play in the actions of Dr Tang in sending the samples to the the first defendant. Therefore in this case there was no antecedent relationship between the plaintiff and the the second defendant. Following *Dr Kok*'s case therefore the the second defendant cannot be liable for the negligence of the the first defendant.

[23] However going a step further and in considering the circumstances of this case even if such an antecedent relationship could be inferred, the breach of duty in this case was not due to any professional failings of the the first defendant but more of personal failings. The the second defendant cannot be liable for personal failings as opposed to any professional failings of any doctors in the hospital unless the personal failing has been brought to the attention of the the second defendant and no actions are taken by the hospital. As an example if a doctor performs his duty while being drunk the hospital cannot be held liable unless the matter had been brought to the attention of the hospital and nothing had been done about it. In this case the the first defendant's apathy could not be blamed on the hospital unless there were prior complaints against the the first defendant for such an attitude and no action had been taken. In this case there is no evidence that any complaints had been lodged against the the first defendant to the hospital. In short the the second defendant cannot be considered liable for the negligence of the the first defendant following even the other features mentioned in the *Woodland*'s case.

[24] The hospital as decided in *Dr Kok*'s case also cannot be vicariously liable for the negligence of the the first defendant as the the first defendant was neither an employee of the the second defendant nor had any contract of service with the the second defendant.

DAMAGES

[25] In assessing damages guidance can be had from the decision in the case of *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend,*

Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885 where it was stated as follows:

> It is trite that damages serve as compensation, not a reward, less still punishment (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] 2 CLJ 198 ... In assessing damages the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk or future damages, must therefore still be undertaken. And the trial judge can only evaluate such damages based on recognised balance of probabilities standard ...

[26] The established practice as to what are the damages that can be claimed in personal injury claim which are also applicable to losses suffered in a medical negligence claim it is stated in *Buckley Law of Negligence and Nuisance* (5th Ed) at p 523 as follows:

> The practice is now established', said Lord Denning MR in 1979, when the case of *Lim Poh Choo v Camden and Islington Area Health Authority* was in the Court of Appeal, 'that in personal injury cases, the award of damages is awarded under 4 main heads. First special damages in the shape of money actually expended. Second, cost of future nursing and attendance and medical expenses. Third, pain and suffering and loss of amenities. Fourth loss of future earnings'. The latter three headings are collectively referred to as 'general damages'.

SPECIAL DAMAGES

[27] In this case under the head of special damages the plaintiff claimed for five items as follows:

(1) Perbelanjaan perjalanan RM6,900;

(2) kos hospital dan rawatan perubatan RM96,000;

(3) Kos terapi pemulihan sbg RM70,000

(4) kos kehilalnagan pendaptan (ogos 2015 to December 2016 RM935,000; dan

(5) kos sara hidup tambahan yang timbul dari keretkan perkahwinan RM45,000.

[28] Before evaluating the five items it is best to consider the case of *Ong Ah Long v Dr S Underwood* 1983] 2 MLJ 324; [1983] 2 CLJ Rep 300 which decided as follows:

> It is a well established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in proper measure of damages and are not too remote ...

[29] It is the evidence of the plaintiff in this case due to the shock of discovering the malignant cancer in 2015 it set her off into a depression and to calm herself down she had to travel to various places and countries and this resulted in the travelling expenses and expenses of accommodation and food. To me this was not a proper measure of damages to be given as these trips were unnecessary and could be termed as remote and unforeseeable. The courts in England have decided that morbid depression for witnessing an accident can be compensated. Similarly in this case the depression and mental agony suffered by the plaintiff on discovering the cancer two years later is foreseeable and damages can be given. However for the plaintiff to go on foreign holiday to calm her nerves in the court's view is certainly not foreseeable by any stretch of the imagination. The court therefore decided to disallow these items of special damages.

[30] The court also disallowed the loss suffered as a result of a breakdown in the plaintiff's marriage to her husband. From the testimony of the plaintiff herself the breakdown of her marriage was a result of her own unreasonable behavior. Further it was the plaintiff who left the marital home on her accord. The court also observed in this case that the plaintiff's husband was present in court on the initial days of the trial.

In the case of *Pritchard v J H Cobden Ltd and another* [1987] 1 All ER 300 (CA) the court decided that financial consequence of a divorce was too remote to be recoverable or would be excluded as being an inherent economic loss or as a matter of policy.

[31] The court in this case allowed the cost of treatment of RM96,000 although the plaintiff by virtue of working with the the second defendant the cost of her treatment was borne by the the second defendant. The plaintiff in her testimony was willing to forgo this sum of money. However on the strength of *Dr Kok*'s case her counsel submitted for this sum to be given regardless of whether this expense was not borne by the plaintiff.

In *Dr Kok*'s case the court stated as follows:

> The common law has long recognised instances where special damages are recoverable although the plaintiff has not been left poorer in balance sheet terms. We see no reason how for instance, a claim for care gratuitously provided by a plaintiff's parents in Marrapan should be treated in any respect differently from a claim for medical expenses covered under an insurance policy. As such we consider the description of special damages as 'out of pocket expenses' as an illustration for general guidance, and is not meant to be taken literally as a conclusive requirement in every case.

Further on the court stated as follows:

> It remains to be addressed the suggestion that the plaintiff would be unjustly enriched if, having had the medical expenses paid for by the insurer, he is allowed to claim the same expenses from the surgeon. At the outset we agree with the Court of Appeal that unjust enrichment cannot be used to diminish the operation of s 28A(1)(a) which caters for specific circumstances such as the present case, for, equitable principles cannot operate to defeat clear statutory provisions ...

[32] Finally on special damages the plaintiff claimed for loss of income from August 2015–December 2016. There were no documents produced by the plaintiff to prove the loss of income for the period claimed. The document tendered to show loss of income is P123 which shows loss of income for three months ie at an average of RM40,000 a month. The court therefore awarded this sum as loss of income.

GENERAL DAMAGES

Cost of future medical and surgical treatment and surveillance

[33] The court accepted the evidence that the plaintiff as a result of her ailment and treatment has to undergo future medical and surgical treatment. The four treatments identified are monthly hormone treatment in the sum of RM900, yearly MRI or CT scan in the sum of RM2,000, future surgery RM30,000 and the cost of chemotherapy in the sum of RM5,000 per cycle.

[34] The court however believed that this future treatment would be only necessary in the event of the recurrence of the disease. There is evidence in this case the earliest the decease can recur is in five years time and the chance of recurrence is quite high.

[35] The plaintiff prayed for future treatment based on life expectancy of a Chinese woman in Malaysia which is 70 years old minus the plaintiff's age of 51 years and to deduct 30% for exigencies leaving a multiplier of 13 years. The court while accepting the plaintiff's calculation took into account the likelihood of recurrence will only be after five years. The court therefore opted to further reduce the multiplier by five years and allowing a multiplier of eight years of the amount as submitted by the plaintiff.

Pain and suffering and loss of amenities

[36] The court in taking note that as a result of the negligence of the the first defendant the plaintiff suffered considerable pain and suffering which she has highlighted and described in her testimony. The court in accepting and believing the testimony of the plaintiff on this awarded a sum of RM200,000

under this head of damages. This sum also covers any future pain and suffering as a result of further treatment and surgery.

Loss of earning capacity and future loss of earnings

[37] In this case the plaintiff failed to show any future loss of earning or loss of earning capacity. From the financial statement of the plaintiff tendered by the plaintiff it could be seen the plaintiff apart from initial period of one or two months earned as much as she was earning before the surgery. There is no evidence led to show that the surgery had affected the plaintiff's capability as a cardiologist. The court therefore decided not to award any damages for either loss of earning or loss of earning capacity.

[38] The court allowed a 4% interest on special damages from August 2015 to the date of judgment and 8% for general damages from date of service of writ to date of judgment and post judgment of 8% from date of judgment till date of settlement.

[39] Finally the court allowed a cost of RM70,000 for the plaintiff against the the first defendant and a cost of RM20,000 for the the second defendant against the plaintiff.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh